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THE REGULATION OF CREATIVITY UNDER THE WIPO INTERNET TREATIES

*Ruth L. Okediji**

INTRODUCTION

After seven years and intense, breathtaking negotiations of Hollywood-style epic proportions, a copyright law for the digital age was born.[1] The World Intellectual Property Organization (WIPO) Copyright Treaty[2] (WCT) and the WIPO Performances and Phonograms Treaty[3] (WPPT) (collectively, the WIPO Internet Treaties) opened for signature in 1996 and entered into force in 2002,[4] officially ushering global copyright law into the information age. Both the WCT and WPPT formally acknowledged the "profound" impact of information and communication technologies on the creation and use of literary and artistic works, and on the production and use of performances and phonograms. The legal framework established was to facilitate "adequate solutions to questions raised by new economic,

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1. JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996: THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY: COMMENTARY AND LEGAL ANALYSIS 3–4 (2002) (citing 1989 as the first stirrings of work toward the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and noting that the first session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms was held in 1993).

2. World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (1997) [hereinafter WCT].

3. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT].

4. For a treaty to enter into force means it has become binding between the parties that have ratified or acceded to it. Both treaties required thirty states to ratify or accede before they entered into force. *See* WPPT, *supra* note 3, art. 29; WCT, *supra* note 2, art. 21. The WCT entered into force on March 6, 2002; the WPPT followed suit on May 20, 2002. The WCT had seventy parties as of March 22, 2009. WIPO, Contracting Parties—WCT, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Mar. 22, 2009) [hereinafter WCT Contracting Parties]. As of the same date, the WPPT had sixty-eight signatories. WIPO, Contracting Parties—WPPT, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20 (last visited Mar. 22, 2009).

social, cultural and technological developments."[5] Less than a decade after becoming law, it is fair to say that the WIPO Internet Treaties are far less salient in the current policy and legal considerations about how knowledge creation might best be encouraged and sustained in the online context.

Like prior copyright treaties, the WCT and the WPPT pivot on the contested utilitarianism that defines modern international copyright law, namely, that proprietary incentives are a critical requirement for knowledge creation.[6] But digital technologies have disrupted long-settled canons of the classic copyright defense in at least some fundamental ways.[7] First, digital technologies have made it possible to overcome characteristic public goods limitations by perfecting authorial control over terms of access to creative works. As firmly established business models failed to capture rent through the full range of exploitation made possible by digital technologies, copyright owners sought a presumptive fiat over the architecture that made use and distribution over digital networks a pervasive feature of contemporary social interaction. Second, the phenomenon of social networking occasioned an acute shift in the cultural-turned-market realities confronting content proprietors. The rise of Web 2.0 illustrated clearly a truth muted by the regimented world of print works, namely, that robust creativity and corresponding economic success require users' ability to access and fully engage creative content across a spectrum of formats and devices. Given the unrestrained versatility of innovation in the digital arena, the WIPO Internet Treaties have fallen considerably short in what was to be their central mission, namely, to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context.

This is not to say, however, that the WCT and the WPPT have not affected copyright law and doctrine in ways beyond what the participants imagined at the end of the diplomatic conference that yielded the substantive texts.[8] Academic commentary describing the perceived victories of the conference for copyright's age old balancing act between incentives and access led to euphoric headlines such as *Africa 1 Hollywood 0*,[9] which hailed an outcome that many agreed recognized public-oriented considerations in the design of global copyright.[10] In the midst of the

5. *See* WPPT, *supra* note 3, pmbl.; WCT, *supra* note 2, pmbl.

6. WCT, *supra* note 2, pmbl., para. 4.

7. *See, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 54–159 (2008).

8. For examples of some of the unintended consequences of U.S. implementation of the WCT, see ELEC. FRONTIER FOUND., UNINTENDED CONSEQUENCES: TEN YEARS UNDER THE DMCA (2008), *available at* http://www.eff.org/files/DMCAUnintended10.pdf.

9. *See* John Browning, *Africa 1 Hollywood 0*, WIRED, Mar. 1997, at 61; *see also* Pamela Samuelson, *Big Media Beaten Back*, WIRED, Mar. 1997, at 61 [hereinafter Samuelson, *Big Media*]; Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134 [hereinafter Samuelson, *The Copyright Grab*].

10. *See* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 370–71 (1997) (noting that, as concluded, the treaties "are more compatible with traditional

celebration over what did *not* happen in Geneva, given the ambitious agenda of copyright proprietors,[11] there was express acknowledgement that what hung in the balance was the future of consumer interaction with new digital technologies and, specifically, how copyright law would mold that future.[12] Looking back now, it seems presumptuous to have arrogated such centripetal power to copyright doctrine when the treaties were intentionally far less concerned with enabling new modes of creative enterprise than preserving the existing presumptions in favor of authorial prerogative.[13] Given copyright's vintage history, seven years into this new digital copyright era may be too early to say with confidence that the future is here. But certainly, key features of that future have emerged and, in the view of many, remain troubling. Recent judicial decisions in the United States, however, also indicate a readiness to limit the role of the WIPO Internet Treaties in defining the conditions in which copyright owners may co-opt the digital world and constrain the use of knowledge goods online.

Part I of this essay briefly reviews the environment from which the WIPO Internet Treaties emerged, focusing in particular on the status of the treaties as special agreements under Article 20 of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[14] I discuss how this designation foreshadowed some of the ensuing developments in international copyright law, specifically by extending a worn paradigm of copyright relations between authors and users that fails to account for the dynamic and iterative nature of the creative enterprise in the

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principles of U.S. copyright law than was the high-protectionist agenda that U.S. officials initially sought to promote in Geneva"); *see also* David Nimmer, *A Tale of Two Treaties: Dateline: Geneva-December 1996*, 22 COLUM.-VLA J.L. & ARTS 1, 1 (1997) ("It was the best of times, it was the worst of times. It was a far, far better copyright treaty than any the world had ever attempted before. It began with Great Expectations; by the end, the participants felt, if not quite like *Les Misérables*, at least as if they had emerged from a Bleak House.").

11. *See* Samuelson, *supra* note 10, at 370–71.

12. *Id.* at 372 (describing the negotiations as "a battle about the future of copyright in the global information society" (citing Mihály Ficsor, *Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument*, *in* THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT 111, 118–22 (P. Bernt Hugenholtz ed., 1996); Bruce Lehman, *Intellectual Property and the National and Global Information Infrastructures*, *in* THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT, *supra*, at 103, 103–09)); Browning, *supra* note 9, at 63 ("[The conference] did not give copyright holders many of the new legal powers they asked for—mostly because delegates feared that they would use those powers to force the future into the mold of the past, and so rob the Net of its potential to create change.").

13. *See* WORLD INTELLECTUAL PROP. ORG., WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE §§ 5.222–5.227, at 271–72 [hereinafter WIPO HANDBOOK], *available at* http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf. "During the preparatory work, an agreement emerged that the transmission of works on the Internet and in similar networks should be the object of an exclusive right of authorization of the author or other copyright owner, with appropriate exceptions." *Id.* at 271.

14. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended on Sept. 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

digital age, including the significance of digital copyright rules on scientific research.[15]

Part II analyzes the new rights introduced by the WCT and evaluates their import for traditional copyright concerns. I suggest that, far from harmonizing copyright law with respect to rights in the digital arena, the WCT instead introduced a greater deference to national copyright laws that the Berne Convention had long sought to diminish with respect to traditional copyright. Although initially such deference produced national legislative outcomes that inordinately undermined knowledge creation and the corresponding public interest therein, there is a deepening and unrelenting call for global action,[16] and some positive national responses,[17] that could address the access and innovation deficit associated with an unbalanced international copyright regime.

Part III briefly surveys domestic implementation of the WCT based on a WIPO study and explores how national trends in this regard fall short of addressing the spectrum of use attendant to digital works, information networks, and their relationship to the commercial success of new technologies. Finally, I question the role and expediency of participation by developing and least-developed countries (DCs & LDCs), whose agency was critical to the entry into force of the WIPO Internet Treaties. The regulation of creativity by the treaties in no way acknowledges the collaborative forms of creative engagement with which citizens in the global South have long identified, nor the cultural relativity of copyright's most enduring cannons. The social and legal recognition of new forms of creativity expressed through digital technologies offers an important opportunity to reconsider how international copyright law might accommodate a dynamic collage of incentives to support the innovative process across geographical, cultural, and technological boundaries.[18] In

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15. *See generally* Reto M. Hilty, *Five Lessons About Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn*, 53 J. COPYRIGHT SOC'Y U.S.A. 103 (2006); Jerome H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, LAW & CONTEMP. PROBS, Winter/Spring 2003, at 315.

16. *See, e.g.*, Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INTERNATIONAL PUBLIC GOODS & TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3 (Keith Maskus and Jerome Reichman eds., 2005); Jerome H. Reichman, Graeme Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007).

17. *See, e.g.*, *Commission Green Paper on Copyright in the Knowledge Economy*, at 3, 4–6, COM (2008) 466/3, *available at* http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf (last visited Mar. 28, 2009) (setting forth a number of issues connected with the role of copyright in the digital age in order to "foster a debate on how knowledge for research, science and education can best be disseminated in the online environment").

18. *See, e.g.*, Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1178–92 (2007); Paul E. Geller, *Beyond the Copyright Crisis: Principles for*

the meantime, however, for both developed countries and DCs/LDCs, sustainable creativity may require ongoing reliance on noncopyright regimes, such as consumer law, competition policy, and human rights.[19] Already, these regimes have attracted attention as mechanisms to secure the benefits and opportunities of access to and use of existing knowledge goods that once were left solely for copyright to bestow on her global audience.

I. TECHNOLOGY, AUTHORSHIP, AND CONSUMERISM

A. *Copyright and Technology: Antecedents on the Road to Geneva*

Technology and copyright have long shared an intimate relationship, and it is routine to describe copyright law as the product of technological change.[20] From the printed word to maps, charts, and functional objects that today comprise, for example, architectural works,[21] copyright has simultaneously mediated the relationship between authors and their works on the one hand, between users and copyrighted works on the other, and between the two *inter se*. In the classic copyright story, "authors" and "users" are protagonists who occupy distinct spaces and react to copyright differently. Accordingly, the law speaks to one or the other, but never to both simultaneously or with the same concerns.[22] Authors are to be

Change, 55 J. COPYRIGHT SOC'Y U.S.A. 165, 170 (2008) (accentuating "the truism that culture is enriched as it is fed back for each of us autonomously to elaborate").

19. *See, e.g.*, Natali Helberger & P. Bernt Hugenholtz, *No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law*, 22 BERKELEY TECH. L.J. 1061 (2007); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 49–50 (2004).

20. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) ("From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection." (footnote omitted)); H.R. REP. NO. 104-554, at 6 (1996) ("The Copyright Act was last generally revised in 1976, in response to the many technological changes that had occurred since the enactment of the 1909 Act. Since 1976, Congress regularly has had to address new issues, especially those raised by new technologies or new methods of exploitation."); H.R. REP. NO. 101-735, at 7 (1990) ("Even though the 1976 Copyright Act was carefully drafted to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes. Copyright is, in large part, a response to new technology."); PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 21 (Stanford Univ. Press, rev. ed. 2003) (1994) (noting that copyright has always been "technology's child"); Douglas Reid Weimer, *Digital Audio Recording Technology: Challenges to American Copyright Law*, 22 ST. MARY'S L.J. 455, 491 (1990) ("Over the years, American copyright law has evolved in order to respond to societal and technological changes.").

21. *See* John B. Fowles, *The Utility of a Bright-Line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in* Leicester v. Warner Bros., 12 UCLA ENT. L. REV. 301, 308 n.41 (2005) (tracing evolution and expansion of the subjects of copyright protection to the inclusion of architectural works).

22. For criticism of this binary approach and arguments in favor of a more developed construction of the consumer in copyright law, see Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003).

protected by copyright as the fountain of creative expression by which social welfare will be enhanced; users are to be at once benefited by having access to protected works, but also constrained by copyright to preserve the incentives that pervade the utilitarian scheme. For much of its history, then, a presumptive cloak woven from notions of an authorial process in which literary works emerge solely from the mind of a single person called an "author," rather than a "user," has hung heavily on the copyright frame and powerfully shaped considerations of copyright's allocation of proprietary rights.[23]

The image of copyright law's audience as passive recipients and/or inert absorbers of content became the subject of increasing scholarly criticism[24] just as the emergence of digital technology revealed in concrete, practical terms the inadequacy of this conceptual framework. The consumer electronics revolution of the late 1980s,[25] which presaged the digital revolution, altered how *consumers* could access and experience creative works on a scale akin perhaps to how the printing press changed how *owners* could control access to and copying of literary works. By the late 1990s, the ubiquity of the Internet over the mundane and the sublime aspects of daily life engendered a symmetry between owners and users of digital works, concurrently empowering the capacity of both groups to reach markets with protected works in unprecedented fashion. Owners and consumers were equally disrupted from their settled expectations surrounding the production, distribution, and experience of the creative enterprise;[26] but, very quickly, owners seized upon the imprimatur of

23. For criticisms of this view of the individual "romantic" author, see, for example, Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 302, 319–20 (1992) [hereinafter Jaszi, *On the Author Effect*]; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 458–60; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965–66 (1990) ("Our copyright law is based on the charming notion that authors create something from nothing, that works owe their origin to the authors who produce them." (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 1.06[A] , 201[A], at 2-8.1, (1989)); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 288–92 (1992).

24. *See, e.g.*, Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1179 (2007) (noting the "conventional dichotomies between author and consumer, author and imitator, author and improver, and author and critic that pervade the copyright literature"). *See also generally* Jaszi, *On the Author Effect*, *supra* note 23 (summarizing various critiques of the author concept); Litman, *supra* note 23; Liu, *supra* note 22.

25. *See* Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENVTL. L. REV. 51, 92 (2006) (identifying the "infancy" of the consumer electronics revolution as of 1980); David L. Glotzer, Note, *Reading Between the Lines: High Definition Television, Antitrust Reform and America's Chance to Get Back into the Television Business*, 10 CARDOZO ARTS & ENT. L.J. 127, 136 (1991) (referring to "CDs in the 1980s" as a "major revolution in the consumer electronics industry").

26. Digital media are leading industries and consumers "to abandon the central reality of modern economic life—the market exchange of property between sellers and buyers." JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE 4 (2000); *see also* Paul Ganley, *Digital Copyright and the*

copyright title to assert priority in considerations of what new rights might be needed to fully exploit the new media to distribute works, while also controlling access and use.[27] Underlying the presumption of authorial ascendancy was a more complex set of ideals that viewed the digital arena as no more than another technological stage that justified copyright status with regard to treating owners as the only indispensable actors in formulating the copyright bargain.

In practice, however, courts have long recognized the illusoriness of a stark author/consumer distinction. Justice Joseph Story's well-known depiction of the creative process in *Emerson v. Davies*[28] identified copying as an essential part of authorial ingenuity,[29] a fact that is very much woven into copyright doctrine today.[30] Indeed, copying in some cases has been

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New Creative Dynamics, 12 INT'L J.L. & INFO. TECH. 282, 302–03 (2004) ("Consumers seem eager to immerse themselves in a digital entertainment market whilst the industry clings to antiquated conceptions of the copy and redundant distribution channels."); Michael P. Matesky II, Note, *The Digital Millennium Copyright Act and Non-infringing Use: Can Mandatory Labeling of Digital Media Products Keep the Sky From Falling?*, 80 CHI.-KENT L. REV. 515, 516 (2005) (noting impact of technology on consumers' expectations about fair use).

27. *See* WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS pt. II (1994), *available at* http://palimpsest.stanford.edu/bytopic/intprop/ipwg/ (describing how technology can be used to control distribution of, and access to, protected works); WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 177 (1995), *available at* http://www.uspto.gov/go/com/doc/ipnii/ipnii.pdf ("Concurrently, copyright owners are developing and implementing technical solutions to facilitate the delivery of protected works in an easy, consumer-friendly yet reliable and secure way. These solutions enable copyright owners not only to protect their works against unauthorized access, reproduction, manipulation, distribution, performance or display, but also serve to assure the integrity of these works and to address copyright management and licensing concerns.").

28. 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) ("The thoughts of every man are, more or less, a combination of what other men have thought and expressed .... If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.").

29. Copying is valued in some cultures as a symbol of respect and high honor. *See, e.g.*, WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 29 (1995) (noting that in ancient Chinese culture, copying "bore witness to the quality of the work copied and to its creator's degree of understanding and civility"). Korean culture also viewed copying not as an offense, but as a "recommended activity, reflecting a passion for learning." *See* Sang-Hyun Song & Seong-Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118, 120 (1994); *see also* Assafa Endeshaw, *Intellectual Property Enforcement in Asia: A Reality Check*, 13 INT'L J.L. & INFO. TECH. 378, 385 (2005) ("On the other hand, Asian attitudes towards the concept of intellectual property appear to coalesce. Imitation or copying from works of other people is not generally viewed as illegitimate or, even, questionable."); Patrick H. Hu, *"Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT'L L.J. 81, 104 (1996).

30. *See* Litman, *supra* note 23, at 966–67, 970–77; Liu, *supra* note 22, at 405–20. Nowhere is copying more entrenched into copyright than in the context of derivative works.

recognized by courts as "original" enough to warrant protection by copyright.[31] Yet, with the facility of digital technology, copying appeared to have lost any authorial virtue or legal value. Instead, the prospect of mass-scale copying of digital works resurrected the passive image of copyright's audience with ever greater force and inflexibility. The increased autonomy, privacy, secrecy, and ease with which copyrighted works could be used or enjoyed generated immense angst in the entertainment industry, particularly over the security of traditional copyright rights in a digital environment.[32] The author-consumer/ consumer-author spectrum was suppressed in the ensuing forceful discourse over how best to serve the public interest in view of the capacity inherent in digital networks to engender untold nefarious activities with respect to creative works. Domestic efforts in the United States to retool copyright for the digital environment focused almost entirely on how digital technologies could facilitate greater rent from *uses* of copyrighted works, not on how copyright law might be recalibrated to stimulate creative output, effective dissemination, and user participation in the creative process. Initial proposals were radical at best and outrageously audacious—calling for control by the copyright owner over all digital reproductions of works transmitted over the Internet, even those reproduced in temporary form;[33] elimination of the first-sale doctrine;[34] elimination of fair use when licensing of the work is possible;[35] and giving control to owners over every digital transmission.[36] In addition, there were proposals for technological protection and anticircumvention measures to secure the expanded menu of proposed rights.[37]

See also Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983).

31. *See, e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) ("'[W]hile a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will.'" (quoting Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2d Cir. 1927))); Phoenix Renovation Corp. v. Rodriguez, 439 F. Supp. 2d 510, 516 (E.D. Va. 2006) ("Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's addition', it is enough if it be his own." (quoting M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 438 (4th Cir. 1986))); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959).

32. *See, e.g.*, Lucy Cradduck & Adrian Mccullagh, *Designing Copyright TPM: A Mutant Digital Copyright*, 13 INT'L J.L. & INFO. TECH. 155, 165 (2005) (describing industry fears over unauthorized distribution via the Internet); Matt Richtel, *Surfing for Music*, POPULAR SCI., Sept. 1, 1999, at 70 (noting that "Web music" threatens the industry's business model); Yoshiko Hara & Junko Yoshida, *Code Hack Prompts Delay of DVD-Audio Launch*, ELECTRONIC ENGINEERING TIMES, Dec. 3, 1999, *available at* http://www.eetimes.com/showArticle.jhtml?articleID=18303366 (describing the "immediate threat" of copying digital audio DVD disks).

33. *See* Samuelson, *The Copyright Grab*, *supra* note 9, at 136.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

As is well known, the avid efforts to secure large-scale transformation of copyright law for the digital age were not initially successful on the U.S. domestic front,[38] and ultimately the terrain for this great contest became WIPO.[39] There, with the concerted and coordinated efforts of DC negotiators, civil society groups, private industry representatives, and coalitions of scholars, research institutes, and libraries, an ambitious effort to convert all the gains of the digital environment into surplus rent for copyright owners was successfully rolled back—at least for that moment in time. As the years have unfolded, and national implementation of the WIPO Internet Treaties has taken distinct twists and turns, the sweet success of the multilateral negotiations has gradually turned sour—at least in some regards—for those who view copyright law as an instrument to be used in pursuit of public ends that contemplate social gains from protection of and access to creative works.

B. *Never Too Strong: The Legal Design Context for the WIPO Internet Treaties*

As consumer technologies traversed the experiential space between content and access,[40] creative and consumptive processes became

38. *See* Meeka Jun & Steven D. Rosenboro, *The WIPO Treaties: The International Battle Over Copyright Cyberturf*, ENT. & SPORTS LAW., Fall 1997, at 8, 8 ("The [National Information Infrastructure (NII)] Task Force's proposed Copyright Protection Act of 1995 (the NII Act) was fiercely opposed by internet service providers, telecommunications companies, software manufacturers, the academic community and consumer advocacy groups who were concerned that the NII's restrictive policies would stymie the growth of the net. As a result of their lobbying efforts, the NII Act failed to graduate from the Senate committee level, despite strong support from the Clinton Administration."); *see also* Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 782–83 (1997) (noting the Clinton administration's failure to obtain new rights holders' protections in Congress); Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 OR. L. REV. 647, 671 (2000) ("Having failed to obtain Congressional enactment of the White Paper's proposed legislation to expand the copyright rights of digital content providers, the Clinton Administration reintroduced key elements of the failed legislation as treaty proposals at the December 1996 World Intellectual Property Organization (WIPO) conference in Geneva." (citing James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 101 (1997)); Samuelson, *supra* note 10, at 410–11; Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 833 (2000) (same).

39. *See* Convention Establishing the World Intellectual Property Organization art. 3, July 14, 1967, 21 U.S.T. 1749, 848 U.N.T.S. 3 ("The objectives of the Organization are: (i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, (ii) to ensure administrative cooperation among the Unions.").

40. *See* Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 73 (2007) ("The falling price of Internet access has made such modes of communication accessible to the mass market. So too have the expanding array of places and devices from which consumers can use the Internet, as well as the falling price of computers. Nearly all public libraries provide Internet access and by 2004, most even had broadband access. Consumers can now reach

inextricably and unavoidably linked, particularly on the Internet, where the line drawing between authors and consumers was bound to be vexatious.[41] Yet, copyright's stubborn adherence to the author/consumer paradigm remained adamantly pervasive; the WCT is modeled precisely along this author/consumer axis as though digital networks posed no different possibilities than past technologies, to which copyright responded primarily by recognizing new subject matter and new types of rights for owners.[42] Before turning to the substantive provisions of the WIPO Internet Treaties, however, it is important first to describe the international legal framework in which the treaties emerged.

In international copyright parlance, the WIPO Internet Treaties are "special agreements" pursuant to Article 20 of the Berne Convention.[43] Under this article, Berne member states can enter into copyright agreements only if "such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [the] Convention."[44] This provision was intended to reflect the existing network

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the Internet through cell phones and an array of small hand-held devices. With respect to home computer access, from 1996 to 1999 computer prices fell by over 32% per year in the United States. Since 1999, computer prices have only continued to fall, dropping over 16% in 2005 alone." (citing JOHN CARLO BERTOT, INFO. USE MGMT. & POLICY INST., PUBLIC LIBRARIES AND THE INTERNET 2004: SURVEY RESULTS AND FINDINGS (2005), *available at* http://www.ii.fsu.edu/plinternet_findings.cfm; Dale W. Jorgenson, *U.S. Economic Growth in the Information Age*, ISSUES IN SCI. & TECH. ONLINE EDITION, Fall 2001, tbl.1, http://www.issues.org/18.1/jorgenson.html)); Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 534–35 (2003) ("[Due to Napster, the] relevant universe of potential transaction partners for copyright infringers was expanded to unprecedented levels. An individual, aided by this technology, could easily engage in *de maximus* copyright infringement without ever leaving his home." (footnote omitted)); James Chapman, Note, *Russian Web Sites Jeopardize U.S. Users: The Dangers of Importing Copyrighted Material over the Internet*, 29 HASTINGS INT'L & COMP. L. REV. 267, 274 (2006) ("With the advent of computer and Internet technology, the cost of copying and distributing protected content has dramatically decreased.").

41. *See* Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS 3, 10 (2007) ("The growth of YouTube since the 2004 election has led to the creation of a growing number of video blogs. Not only can anyone operate a 'cyber newspaper,' but increasingly most anyone can operate a 'cyber television station.'" (footnote omitted)); Joseph Gratz, Note, *Reform in the "Brave Kingdom": Alternative Compensation Systems for Peer-to-Peer File Sharing*, 6 MINN. J.L. SCI. & TECH. 399, 408–09 (2004) (describing creation of "mash-ups"); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 664 (1997) (describing "fan fiction" disseminated on the Internet).

42. *See* Aashit Shah, iBrief, *UK's Implementation of the Anti-circumvention Provisions of the EU Copyright Directive: An Analysis*, 2004 DUKE L. & TECH. REV. 3, ¶ 2, *available at* http://www.law.duke.edu/journals/dltr/articles/pdf/2004DLTR0003.pdf (noting that the WCT "is principally aimed at adapting the legal paradigm of copyrights to new technology" (citing Samuelson, *supra* note 10, at 378)).

43. REINBOTHE & LEWINSKI, *supra* note 1, at 3 (stating that the WCT is a special agreement under Berne); *id.* at 242–43 (stating that, although the WPPT does not explicitly claim to be a special agreement, it should be considered one); *see also* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 591 (2002) (same).

44. Berne Convention, *supra* note 14, art. 20.

of bilateral economic relations between member states, which had been extensive prior to the negotiations for the Berne Convention and which was likely to continue despite the nascent multilateral cooperation evidenced by the convention.[45] Given the minimalist approach to international copyright protection that necessarily characterized the Berne Convention negotiations,[46] countries did not intend to foreclose the possibility of bilateral agreements with higher levels of copyright protection on a reciprocal basis than was afforded by Berne. Accordingly, the Berne Act[47] incorporated two provisions to secure the negotiated multilateral baseline for copyright protection. The first was an Additional Article that preserved the legitimacy of existing agreements between member states that already contained rights stronger than those agreed to in the Berne Convention or that were "not contrary to [the] Convention."[48] The second provision, contained in Article 15, reiterated the same standard for application to future agreements between Berne signatories, namely, that bilateral "special arrangements" could prospectively be concluded between member states, but only so long as such arrangements conferred stronger rights or terms not contrary to the provisions in the Berne Convention.

For the most part, the strategic and structural importance of these two provisions has been overlooked by scholars and commentators.[49] The addition of these clauses to the design of the multilateral copyright framework effectively foreclosed any legitimate possibility of reimagining international copyright as anything but an ever-increasing strengthening of authors' rights.[50] As a result of these provisions, several countries

45. *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, at 25–38 (1987) (describing these relations). For a brief discussion of various periods of bilateralism in international intellectual regulation from a U.S. perspective, see Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 131–46 (2004).

46. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 104 (2000) (describing why the Berne Convention initially set minimal levels of protection).

47. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221. The Berne Act was the first iteration of the convention.

48. RICKETSON, *supra* note 45, at 683–85 (providing the text of the Additional Article of September 9, 1886).

49. *But see* Okediji, *supra* note 45; Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* (Int'l Ctr. for Trade & Sustainable Dev. (ICTSD) Issue Paper No. 15, 2006), *available at* http://www.unctad.org/en/docs/iteipc200610_en.pdf.

50. *See* Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 463 (1998) ("In turn, this [ratcheting] up of domestic standards of intellectual property protection has the potential to change [the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)] into an agreement that underwrites an international copyright grab by United States intellectual property industries."); Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 55 (2004) (describing the "intellectual property ratchet").

denounced bilateral agreements that offered less protection than the Berne Convention.[51] By 1928, the Berne Convention had been revised twice, with the Berlin Revision of 1908 contributing significantly to a unified codification of international copyright to which most European countries acceded. During the Paris Conference of 1971, with increased substantive harmonization of the Berne Convention, the two provisions were merged into a single provision codified as Article 20.[52] It provides,

> The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.[53]

Some initial observations should be made here. First, the willingness of states to denounce existing treaty obligations reflects both the moral and political strength of the negotiated commitments under the Berne Convention, particularly given the absence of an enforcement mechanism to secure compliance.[54] Second, the success of the Berne Convention established an intractable momentum toward consolidation of a strong, harmonized multilateral accord for global copyright protection. I have pointed out elsewhere that the laments about a "one-way ratchet" for intellectual property (IP) rights that have followed the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are not only belated, but also underestimate the deliberate architecture of international copyright. The fact is that the legal design of the Berne Convention purposefully exerts a maximalist force over multilateral copyright regulation[55] by, in effect, defining legitimate treaty activities in the copyright realm as only those that unambiguously enhance the rights of authors and owners.

It is important to examine more closely the full import of Article 20. In addition to requiring that "special agreements" do not offer less protection than the minimum established by the Berne Convention, this provision may also impose significant limitations on a state's ability to negotiate treaties over issues not addressed within the Berne Convention. Professor Sam Ricketson has opined that, under Article 20, the right to make or maintain "special agreements" depends upon a threshold assessment of whether the agreement contravenes the provisions of the convention.[56] Thus, agreements dealing with matters ancillary to copyright, such as the

51. *See* RICKETSON, *supra* note 45, at 683–84.

52. *Id.*

53. Berne Convention, *supra* note 14, art. 20.

54. Although disputes could be brought before the International Court of Justice (ICJ), the compulsory jurisdiction of the court was resisted by many countries. Accordingly, during the Stockholm Revisions, a new provision making jurisdiction of the court optional was added to the Berne Convention. *See id.* art. 33.

55. *See* Okediji, *supra* note 49, at 4–9.

56. *See* RICKETSON, *supra* note 45, at 685–89.

regulation of collecting societies, addressing new subject matter for copyright protection, or a protocol on limitations and exceptions, are all arguably subject to the scrutiny of Article 20.[57] Indeed, even the act of negotiating an agreement inconsistent with Article 20 could arguably be a violation of the Berne Convention,[58] as would agreements between members to suspend the operation of the Berne Convention between them,[59] and agreements to modify the obligations of the Berne Convention, or in other ways end run the level of protection afforded under its terms.[60] The result, at least in theory, is that the rights and obligations of the Berne Convention cannot be constricted by mutual agreement between member states or by the operation of international law under the Vienna Convention on the Law of Treaties (Vienna Convention).[61]

This view of Article 20, if persuasive, would suggest that, in addition to its substantive minima, the Berne Convention also exerts an implicit jurisdictional authority over subject matter that lies beyond the bounds of traditional copyright as reflected in the WIPO Internet Treaties. Thus, notwithstanding the ameliorative outcome of the negotiations,[62] it could be argued that the treaties can only be viewed as strengthening existing global rights for owners. Even an interpretation maintaining the international status quo would be suspect, although the Agreed Statements to the treaties should effectively counter such an argument. Nevertheless, the ritualistic invocation of Article 20 reflects a long-standing pathological exclusion of copyright (and IP generally) from general principles of public international law. Simply put, the constraints of Article 20 are unnecessary in light of obligations under the Vienna Convention, which has mechanisms designed to (1) ensure that states adhere to existing treaty obligations[63] and (2) deal with conflicting treaty obligations.[64] By maintaining Article 20, even if just formally, as the sole authorizing premise for presumptively Berne-consistent copyright agreements, whether or not WIPO-originated, and by further extending its reach to paracopyright subjects, the WIPO Internet Treaties do not go far enough to offer an opportunity to evaluate the

57. *Id.*
58. *Id.*
59. *Id.* at 687.
60. *Id.* at 685–89.
61. *See* Vienna Convention on the Law of Treaties art. 30(3)–(4), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (providing that subsequent treaties on the same subject matter between the same parties prevail over earlier treaties to the extent they are incompatible); *see also* RICKETSON, *supra* note 45, at 687 ("[A]rticle 20 continues to oblige states not to enter into agreements which modify, rather than extend, protection. . . . [I]t goes without saying that this prevents parties to the Convention [from] agreeing to suspend, even temporarily, the operation of the Convention as between themselves. This is an important point, as the general rule of international law appears to be that parties to a multilateral treaty may do this, unless such a suspension is prohibited by that treaty. Article 20 is clearly such a prohibition." (citing Vienna Convention, *supra*, art. 58; IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 185 (2d ed. 1984))).
62. *See* Nimmer, *supra* note 10, at 1; Samuelson, *supra* note 10, at 435–36.
63. *See* Vienna Convention, *supra* note 61, arts. 26–27, 31, 41–46, 54–64.
64. *See id.* art. 30.

normative reach of global copyright principles in the digital age and, more importantly, to assess how the design of the Berne Convention can more explicitly reflect copyright's long-standing commitment to various aspects of the public interest.

II. IN COPYRIGHT'S LINEAGE?: THE NEW RIGHTS OF THE WCT

With the Berne Convention as its starting point, the project of devising a copyright for the information age was circumscribed by two inalterable propositions. The first was obvious: the analogue version of copyright had to be translated into the digital environment.[65] But consistent with the history of copyright's development, the project had to extend beyond a technical translation of extant rights to include accommodation of the new opportunities for use and dissemination of works through digital networks.[66] Notably absent were explicit considerations of what digital technologies could enable with respect to authorship and how information communications networks would make possible new modes of authorship and new genres of creative expression.[67] Indeed, other than noting the "outstanding significance of copyright protection as an incentive for literary and artistic creation,"[68] neither the WCT nor the WPPT reflect the complexity of creative endeavor in an online environment,[69] nor, as increasingly dynamic uses of social networking sites show, do the agreements even portend the myriad of ways users interact with and within digital space.[70] Consequently, the framing principles of the two treaties suggest immediately that the preservation of incentives to create, represented solely by the right to control uses of a protected work, remained

65. WCT, *supra* note 2, pmbl., paras. 1, 2.

66. *Id.* pmbl., paras. 2, 3, 5.

67. *See* Michael Cieply, *Show Series to Originate on MySpace*, N.Y. TIMES, Sept. 13, 2007, at C1 (referring to an Internet site designed to encourage fans' creative work); John Markoff, *Mashups Are Breaking the Mold at Microsoft*, N.Y. TIMES, Feb. 10, 2008, at BU4.

68. WCT, *supra* note 2, pmbl., para. 4.

69. *See Panel III: Fair Use: Its Application, Limitations and Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1039–40 (2007) ("Likewise, people are sharing and creating together, Wikipedia being the clearest example of this. Wiki as a productivity tool of digital natives is well known. And then, lots of people re-aggregating other people's content, so finding what is the best of the digital natives' content that they have created in the Web 2.0 space and then re-aggregating it." (footnote omitted) (remarks of John G. Palfrey Jr., Executive Director, The Berkman Center for Internet and Society, Harvard Law School)); *see also* Lisa Veasman, Note, *"Piggy Backing" on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups*, 30 HASTINGS COMM. & ENT. L.J. 311, 314–15 (2008).

70. *See* Maria Aspan, *Promotion Is Not Just Another Brick in the Wall*, N.Y. TIMES, July 13, 2007, at C5 ("'Social networking has spawned a lot of people creating personal content' . . . ." (quoting Ann Lewnes, Senior Vice President for Corporate Marketing and Communications, Adobe Systems Inc.)); Julie Bosman, *Agencies Are Watching as Ads Go Online*, N.Y. TIMES, Aug. 15, 2006, at C6 (describing user-generated advertisements, using some copyrighted material); Scott Kirsner, *All the World's a Stage (That Includes the Internet)*, N.Y. TIMES, Feb. 15, 2007, at C7 (describing how amateurs are gradually getting paid for creative work on the Internet); Noah Robischon, *Little Films on Little Screens (But Both Seem Set to Grow)*, N.Y. TIMES, Mar. 18, 2007, at AR11.

the core justification and focus of the new digital regime. This focus greatly impoverished the WIPO Internet Treaties by justifying their relevance in terms that vastly underestimated the versatility of the digital environment and the implausibility of excluding consumers, qua users, as part of the global copyright bargain.

With respect to the WCT, Article 1 formally establishes its status as a "special agreement" within the meaning of Article 20 of the Berne Convention.[71] Article 1 retains the distinctiveness of the Berne regime[72] and, unlike the Berne Convention itself, does not provide a formal link to other copyright conventions.[73] However, Article 1's invocation of the Paris Act as the relevant Berne Convention text to which the treaty is to be applied and the inexplicable obligation to comply with the Berne Appendix,[74] strongly indicate a conscious attempt by the negotiators to ensure coordination and continuity between the WCT and the TRIPS

71. *See* WCT, *supra* note 2, art. 1(1) ("This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention.").

72. *See id.* ("This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties."); *id.* art. 1(2) ("Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.").

73. *Compare* WCT, *supra* note 2, art. 1, *with* Berne Convention, *supra* note 14, art. 20. For analysis of the relationship of the Berne Convention to the Uniform Commercial Code (UCC), see Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 71, 75–76 (1988); Kelsey Martin Mott, *The Relationship Between the Berne Convention and the Universal Copyright Convention: Historical Background and Development of Article XVII of the U.C.C. and Its Appendix Declaration*, 11 PAT. TRADEMARK & COPYRIGHT J. RES. & EDUC. 306, 307 (1967). TRIPS has rendered the UCC largely irrelevant. *See* Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SINGAPORE J. INT'L & COMP. L. 315, 333 (2003) ("Despite the United States' recent rejoining of [the United Nations Educational, Scientific and Cultural Organization (UNESCO)], and the formal persistence of the UCC as an instrument of international law, the incorporation of substantive provisions of the Berne Convention into the TRIPS Agreement has, for all intents and purposes, relegated the UCC to the periphery of international copyright protection." (citing Sean D. Murphy, *United States' Return to UNESCO*, 97 AM. J. INT'L L. 977 (2003)).

74. *See* Mihály Ficsor, *The WIPO "Internet Treaties": The United States as the Driver: The United States as the Main Source of Obstruction—As Seen by an Anti-revolutionary Central European*, 6 J. MARSHALL REV. INTELL. PROP. L. 17, 32 (2006) ("The options offered in the Appendix to the Berne Convention are out-of-date in the era of more perfect and efficient forms of reprographic reproduction and the widespread use of digital technology and the Internet."); *see also* WIPO, *Report on the Online Forum on Intellectual Property in the Information Society*, June 1–15, 2005, at 25, WIPO Doc. WIPO/CRRS/INF/1 (Sept. 19, 2005) ("Copyright-protected content can also be made available under certain exceptions and limitations to rights in national laws and, in limited circumstances under the Appendix to the Berne Convention, under compulsory licensing of certain rights."). For a more detailed analysis of the appendix's provisions, see Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503, 511–22 (2000).

Agreement.[75] Technically, such coordination should not extend the reach of TRIPS' interpretations to the WCT; however, the commonality of subject matter and close proximity of the negotiations certainly raise a compelling argument for ensuring consistency between the obligations required by the two agreements.[76] Indeed, part of the WCT's goal is to provide clarity to Berne Convention obligations;[77] accordingly, even if a WCT provision cannot be formally invoked for enforcement before a World Trade Organization (WTO) TRIPS dispute panel, it is certainly the case under international law that WCT provisions can and will provide sources of interpretation to TRIPS obligations.[78] This point is particularly applicable to those Berne Convention provisions that have been directly incorporated into the WCT.[79]

In regards to clarifying existing Berne Convention rules, Articles 2, 4, and 5 of the WCT affirm several key principles of copyright law in the international sphere. Most notable is the idea/expression dichotomy,[80] which, although recognized in most jurisdictions,[81] had not been an explicit provision in the Berne Convention.[82] Similarly, the treatment of computer programs as literary works[83] and the protection of original databases[84] were

75. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 9(1), 10(1), 14(3), 14(6), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement].

76. *See* Vienna Convention, *supra* note 61, arts. 30, 31(3); WIPO, *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, at 8–9 (Dec. 20, 1996) [hereinafter WIPO, *Advantages of Adherence*], *available at* http://www.wipo.int/copyright/es/activities/wct_wppt/pdf/advantages_wct_wppt.pdf ("The WCT and WPPT each contain several provisions that impose obligations derived from, and similar to, those in the TRIPS Agreement .... The WCT and WPPT serve to update the TRIPS obligations, creating a modern and comprehensive framework of rights for the digital age.").

77. WCT, *supra* note 2, pmbl., para. 2 ("*Recognizing* the need to introduce new international rules and clarify the interpretation of certain existing rules ....").

78. *See, e.g.*, Vienna Convention, *supra* note 61, arts. 30, 31(3). For a fuller analysis of the relationship between the WCT and the TRIPS Agreement, see generally WIPO, *Implications of the TRIPS Agreement on Treaties Administered by WIPO*, at 164, WIPO Publ'n No. 464(E) (1996); Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441 (1997).

79. *See* WCT, *supra* note 2, art. 3 (incorporating Articles 2 through 6 of the Berne Convention directly).

80. *See id.* art. 2 (setting forth the scope of copyright protection). The idea/expression dichotomy was first explicitly incorporated in the international copyright system in the TRIPS Agreement. *See* TRIPS Agreement, *supra* note 75, art. 9(2).

81. J. A. L. STERLING, WORLD COPYRIGHT LAW 221 & n.10 (2d ed. 2003) (noting that while the idea/expression dichotomy is distinctly a U.S. doctrine and not explicitly incorporated in the laws of major European countries, it has influenced judicial decisions in those countries).

82. Instead, the convention had articulated a definition of "literary and artistic works" and restricted protection for factual works, which together effectively accomplished the delimiting purpose of the idea/expression dichotomy. *See* Berne Convention, *supra* note 14, art. 2.

83. *See* WCT, *supra* note 2, art. 4.

84. *See id.* art. 5.

explicitly incorporated into the WCT as already recognized in the TRIPS Agreement.[85] By and large, these acknowledgments of rights that already existed as a form of international common law do not portend significant shifts in the digital context.[86] In terms of *new* rights to reflect the impact of digital technologies on the fundamental economics of copyright's core right of reproduction, the WCT recognizes an exclusive right of "making available to the public" originals or copies of works through sales or other means.[87] It also recognizes the exclusive right of authors of computer programs, cinematographic works, and works embodied in phonograms to authorize commercial rental to the public of originals or copies of their works.[88] For these new rights, the term "copies" means only "copies that can be put into circulation as tangible objects" to ensure that transient reproductions, such as those automatically generated by computers in Random Access Memory (RAM) modules, are not swept under the ambit of these provisions.[89]

The WCT also established an exclusive right of communication to the public. Contained in Article 8, the right of communication to the public covers both print and digital works and includes language that constrains the means and ends of user access to protected works. Owners have the exclusive right to make their works available to the public "in such a way that members of the public may access these works from a place and at a time individually chosen by them."[90] The strong presence of Internet Service Providers (ISPs), Online Service Providers (OSPs), and representatives of the telecommunications industry during the WIPO negotiations[91] ensured that merely providing technologies or a physical place to access digital content would not run afoul of the new right.[92]

With the benefit of hindsight, it is clear that this tenuous compromise between content and service providers did not resolve the question of whose

85. *See* TRIPS Agreement, *supra* note 75, art. 10.

86. Indeed, the Agreed Statements to Articles 4 and 5 make clear that the WCT is consistent with sister provisions in the Berne Convention and the TRIPS Agreement. *See* WCT, *supra* note 2, art. 4 n.3, art. 5 n.4.

87. *See id.* art. 6.

88. *See id.* art. 7.

89. *See id.* art.6 n.5 (Agreed Statements concerning arts. 6–7).

90. *See id.* art. 8.

91. *See* Ficsor, *supra* note 74, at 22 (discussing coalition building during negotiations on the WIPO Internet Treaties and highlighting the important role "telecommunication companies, Internet service providers, other information technology industries, entertainment equipment, and recording material manufacturers" played in the successful conclusion of the treaties); Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1058 (2007) ("By the end of the multilateral negotiations held at Geneva in 1996, the intense struggle among stakeholders representing content providers, the telecommunications industry, online service providers, and the educational and scientific communities produced a workable compromise in the WCT.").

92. *See* WCT, *supra* note 2, art. 8 n.8. During the WCT negotiations, a strong consensus emerged against strict liability for Internet Service Providers (ISPs) for copyright infringement. *See* Samuelson, *supra* note 10, at 382–92 (discussing the WIPO negotiations on ISP liability).

presumptive privileges—owners' or users'—should prevail in controlling public engagement with digital content and, more importantly, who should bear the brunt of controlling unauthorized access and use.[93] Despite the basic principle established by WCT Article 8, content providers in Europe have sought tirelessly to direct legislative attention and efforts to mandate greater action by service providers to control users' online activities,[94] while the Digital Millennium Copyright Act (DMCA)[95] in the United States provides a calibrated process or "dance" in which content owners and ISPs play a role in addressing violations of copyright rights.[96] Weary legislators recently appear to see the inefficacy of new laws, instead highlighting the desirability of privately negotiated industry agreements.[97] The claim that "both the WCT and WPPT address the challenges posed by today's digital technologies, in particular the dissemination of protected material over digital networks such as the Internet,"[98] now seems quite hollow in light of the increasing complexity of claims arising from new uses, new users, and new works.

Several recent decisions in the United States addressing the right of distribution highlight the marginal role of the WCT in defining user interests in the face of the traditional copyright balance. In *Capital Records, Inc. v. Thomas*,[99] for example, the U.S. District Court for the District of Minnesota considered the issue of whether making sound recordings available for distribution on a peer-to-peer network qualifies as "distribution" under the 1976 Copyright Act. Rejecting the plaintiffs' claim, the court held that actual dissemination of copyrighted works, rather than making them available for dissemination through a file-sharing

93. *See* Doreen Carvajal, *Net Firms as the New Cybercops?: Critics Wary of Errant Online Users*, INT'L HERALD TRIB. (Paris), Apr. 14, 2008, at 1.

94. *See, e.g.*, *U.K. Urged to Follow France Lead on Piracy*, INT'L HERALD TRIB. (London), Feb. 13, 2008, at 13.

95. WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

96. *See* 17 U.S.C. § 512 (2006); *see also* Reichman et al., *supra* note 91, at 989–94 (describing the legislative history of the DMCA ISP safe-harbors and concluding that they have "generally been efficacious in run-of-the-mill copyright infringement cases involving users and their ISPs" (citing Heidi Pearlman Salow, *Liability Immunity for Internet Service Providers—How Is It Working?*, 6 J. TECH. L. & POL'Y 31, 49–50 (2001); Christian C. M. Beams, Note, *The Copyright Dilemma Involving Online Service Providers: Problem Solved . . . for Now*, 51 FED. COMM. L.J. 823, 846 (1999))).

97. *See, e.g.*, Nikki Tait, *EU to Rule Out New Piracy Laws*, FIN. TIMES (London), May 13, 2008, at 5; Dugie Standeford, *EU Internal Market Chief: Counterfeiting and Piracy Need Industry-Led Solutions*, INTELL. PROP. WATCH, May 14, 2008, http://www.ip-watch.org/weblog/2008/05/14/eu-internal-market-chief-counterfeiting-and-piracy-need-industry-led-solutions/.

98. *See* WIPO Permanent Comm. on Cooperation for Dev. Related to Intellectual Prop., *The Digital Agenda: Implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, at 2, WIPO Doc. PCIPD/3/9 (July 2002) [hereinafter WIPO, *The Digital Agenda*], *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/pcipd_3/pcipd_3_9.pdf.

99. 579 F. Supp. 2d 1210 (D. Minn. 2008).

application, is required to establish the infringement of the distribution right under U.S. law. Utilizing Articles 6(1) and 8 of the WCT and Articles 12(1) and 14 of the WPPT, the plaintiffs argued that the provisions of the Copyright Act should be interpreted in light of the United States' international treaty obligations and therefore should be held to incorporate an exclusive making-available right.[100] Refusing to follow this reasoning, the court noted that since the WIPO Internet Treaties are not self-executing, "the fact that [they] protect a making-available right does not create an enforceable making-available right" under U.S. law.[101] Rather, according to the court, "the contents of the WIPO treaties are only relevant insofar as [a provision of the Copyright Act] is ambiguous and there is a reasonable interpretation . . . that aligns with the United States' treaty obligations."[102]

Similarly, in *Elektra Entertainment Group, Inc. v. Barker*,[103] the U.S. District Court for the Southern District of New York rejected the plaintiffs' call for recognition of a making-available right as "not grounded" in the provisions of the Copyright Act.[104] As in *Thomas*, the court distinguished the construction of the distribution right in the digital context and refused to follow the decision of the U.S. Court of Appeals for the Fourth Circuit in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*,[105] which recognized an enforceable making-available right in the offline environment.[106] Furthermore, the court rejected the plaintiffs' argument that the provisions of the WIPO Internet Treaties should control the interpretation of the U.S. Copyright Act, noting that the treaties "create no private right of action on their own."[107]

As another indication of recent attempts by courts to recalibrate the presumptions that underlie the use of content in the online environment, the court in *Lenz v. Universal Music Corp.*[108] held that the DMCA requires a content owner to have a good faith belief that the use of content is not fair use. The plaintiff argued that fair use is a user's right protected by the Copyright Act, a privilege that the defendants reframed as merely a defense.[109] The court ruled that "[t]he purpose of [the DMCA] is to prevent the abuse of takedown notices," and "[a] good faith consideration of whether a particular use is fair use is consistent with the purpose of the

100. *Id.* at 1225–26.
101. *Id.* at 1226.
102. *Id.*
103. 551 F. Supp. 2d 234 (S.D.N.Y. 2008).
104. *Id.* at 243.
105. 118 F.3d 199 (4th Cir. 1997).
106. *Barker*, 551 F. Supp. 2d at 243–44 (citing *Hotaling*, 118 F.3d at 201); *see also* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 166–69 (D. Mass. 2008) (holding that infringement of the right to distribute requires the actual dissemination of copyrighted works); *In re* Napster, Inc. Copyright Litig., 377 F. Supp. 2d 796, 802–05 (N.D. Cal. 2005) (noting that to establish a violation of the distribution right, the plaintiff must show proof of either actual dissemination of a copyrighted work or an offer to distribute).
107. *Barker*, 551 F. Supp. 2d at 242 n.7.
108. 572 F. Supp. 2d 1150 (N.D. Cal. 2008).
109. *Id.* at 1154.

statute."[110] Further, the court observed that "[r]equiring owners to consider fair use will help 'ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand' without compromising 'the movies, music, software and literary works that are the fruit of American creative genius.'"[111]

As these cases illustrate, the challenge of digital content ownership is aggravated by the proliferation of consumer technologies and social networking sites, which routinely enable repeated access to and use of digital content such that consumers hardly expect interference with their ability to control, access, and manage an array of works created, shifted, and shared across a versatile set of personal, portable technologies. It is not merely the easy availability of content-laden consumer goods that propels an assumption among users that access, use, and sharing are the prevailing norms of the digital environment but, more significantly, the fact that the social (and increasingly economic) currency of the digital age is explicitly dependent on the network features that characterize most new technologies. So powerful is the salience of interactive platforms as prototypical of the digital age that even the recent struggle over a single platform for high-definition videos must, at least in part, be understood as implicitly rooted in the compulsion to create technologies that allow users to employ existing content *and* leverage it across multiple contexts.[112]

Despite the express effort to use the WIPO Internet Treaties to "gap fill" the Berne Convention (which did not contain an exclusive right of communication to the public),[113] the indomitable role of users in enhancing the value of the online world through content creation has in fact produced various efforts to mediate a private compromise between content owners and ISPs/OSPs. The most salient example is the recent collaboration between leading media and content providers that produced a set of guidelines dealing with so-called User Generated Content (UGC).[114] In addition to legislative fatigue, the orientation toward privately negotiated norms to govern the iterative process of creativity in the online world reflects the futility of treating users as external to the creative enterprise, and opens up the possibility of entrenching access principles as a constituent part of the economic models that drive copyright regulation.[115]

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110. *Id.* at 1156.

111. *Id.* (quoting S. REP. NO. 105-190, at 2 (1998)).

112. Marc Saltzman, *New Features Coming for Blu-ray Format: High-def DVD Players Go to the Next Level with Interactive Net Access*, USA TODAY, Mar. 19, 2008, at 4B (describing various new features on Blu-ray machines that allow users to share audio or video content).

113. *See* WIPO HANDBOOK, *supra* note 13, §§ 5.223, 5.225, at 271–72.

114. *See* User Generated Content Principles, Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement., www.ugcprinciples.com (last visited Mar. 22, 2009).

115. In line with this point, a recent study estimated that, as of 2006, companies benefiting from fair use represented one-sixth of the U.S. gross domestic product (GDP). *See* THOMAS ROGERS & ANDREW SZAMOSSZEGI, CAPITAL TRADE, INC., FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 6 (2007).

In this regard, the WIPO Internet Treaties remain imprecise and thus largely irrelevant to the dominant copyright questions facing acceding states today. In obligating states to enhance protection for content providers, but failing to presage the vital role of users in the creative process, the treaties opened up a significant unregulated space in which the major actors—content providers and ISPs—must contend for the creative surplus of the public at large that will help determine the extent of the economic value derived from new technologies.[116]

It would be an overstatement to suggest that the new WCT rights significantly added to the portfolio of claims held by copyright owners. Arguably, existing Berne Convention rights such as the right of reproduction and the right of distribution could have been used to address concerns about granting copyright owners the authority to determine how and when their works could be accessed and used in the online environment.[117] There certainly is no question that the driving principle of the WCT was to give authors the right to control access to and use of their works on digital networks.[118] However, the new rights were in some ways prematurely recognized given the lack of agreement among states as to the specific form of the right to control digital transmissions and public access to protected works.[119] Today, even within the European Union, a consistent approach to the WCT rights has been frustrated by the failure to acknowledge the role of access rights in construing the precise acts for which a user might have violated the author's legitimate entitlement.[120] Similarly, in the United States, as noted earlier, several federal district courts have rejected rights holders' requests for relief and ruled that "making available to the public" is not a right recognized under U.S. copyright law.[121]

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116. *See* Andrew M. Ballard, *Transparency, Trust Said Needed to Develop Effective Marketplace for IP*, 75 Pat. Trademark & Copyright J. (BNA) 447 (2008); *see also* Austin Modine, *YouTube Blocks Music Videos in UK*, REGISTER, Mar. 9, 2009, *available at* http://www.theregister.co.uk/2009/03/09/youtube_blocks_music_vids_in_uk/ (describing the recent dispute between YouTube and the U.K. Performing Rights Society, which resulted in the blocking of most YouTube music videos from U.K. viewers); Tim Arango, *Rights Clash on YouTube, and Videos Disappear*, N.Y. TIMES, Mar. 22, 2009, at BU1 (describing a similar dispute between YouTube and the Time Warner Music Group).

117. *See* Mihály Ficsor, *The Spring 1997 Horace S. Manges Lecture—Copyright for the Digital Era: The WIPO "Internet" Treaties*, 21 COLUM.-VLA J.L. & ARTS 197, 207–14 (1997) (noting the inherent limitations in such an approach).

118. *See* WIPO HANDBOOK, *supra* note 13, §§ 5.222–5.227, at 271–72.

119. *See* Ficsor, *supra* note 117, at 207–10.

120. Guido Westkamp, *Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law*, 36 GEO. WASH. INT'L L. REV. 1057, 1074–79 (2004).

121. *See, e.g.*, Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (noting that "[t]he majority of district courts have rejected the . . . 'making available' theory because [it] is inconsistent with the Copyright Act" and holding that merely making a work available on a peer-to-peer network does not constitute copyright infringement); Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234, 243–45 (S.D.N.Y. 2008); Atl. Recording Corp. v. Brennan, 534 F. Supp. 2d 278, 281–82 (D. Conn. 2008) (describing the "making

The standards ultimately agreed to in the WIPO Internet Treaties leave open a range of design possibilities at the national level,[122] a flexibility that, while desirable politically, also cuts against the chief benefits of a global accord on the scope of digital copyright rights. But, in the end, as already discussed, much of the early debates over the scope and form of the WCT rights fell short of addressing the fundamental question of how digital networks and the value that users bring to the table can be harvested to generate the social and economic value that indispensably fuels the digital economy.[123]

III. DISABLING DEVELOPMENT IN THE DIGITAL AGE

A. *Deference and Disharmony*

By far, the most significant additions to copyright's traditional legacy are the new rights concerning technological measures[124] and rights management information.[125] Articles 11 and 12 of the WCT are the primary examples of new international rights introduced to "provide adequate solutions to the questions raised by new . . . technological developments."[126] Article 11 of the WCT expresses the well-known provision requiring protection for anticircumvention measures used by copyright owners in conjunction with the exercise of their legitimate rights. Article 12 is a corollary to this new right, providing for the protection of rights management information. Both of these provisions have been the most controversial aspects of the WCT. The U.S. implementation of these provisions, which adopts an extreme version in the DMCA,[127] has been extended to the multilateral trade environment through a network of Free Trade Agreements (FTAs), which require countries to ratify the WIPO Internet Treaties.[128] Indeed, in particularly pernicious forms, some FTAs

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available" theory as "problematic"); *In re* Napster, Inc. Copyright Litig., 377 F. Supp. 2d 796, 802–05 (N.D. Cal. 2005) (declining to recognize a "making available" theory of copyright infringement because it is contrary to the weight of authority and "inconsistent with the text and legislative history of the Copyright Act of 1976"); Arista Records, Inc. v. MP3Board, Inc., No. 00 Civ. 4660(SHS), 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002); *see also* Steven Seidenberg, *International 'Making Available' Right Becoming Less Available in US Law*, INTELL. PROP. WATCH, May 28, 2008, http://www.ip-watch.org/weblog/2008/05/28/international-making-available-right-becoming-less-available-in-us-law/.

122. *See generally* Urs Gasser, *Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39 (2006).

123. *But see* Reichman et al., *supra* note 91 (proposing a "reverse notice and takedown" scheme to address public interest uses).

124. *See* WPPT, *supra* note 3, art. 18; WCT, *supra* note 2, art. 11.

125. *See* WPPT, *supra* note 3, art. 19; WCT, *supra* note 2, art. 12.

126. *See* WCT, *supra* note 2, pmbl., para. 2.

127. *See supra* note 95.

128. *See* Anupam Chander, *Exporting DMCA Lockouts*, 54 CLEV. ST. L. REV. 205, 212–16 (2006); *see also* Dominican Republic-Central America-United States Free Trade Agreement art. 15.5.7, Aug. 5, 2004, 119 Stat. 462 [hereinafter CAFTA-DR], *available at*

go as far as to spell out the precise language of obligations, which typically mirrors the language of the DMCA.[129] Since the Berne Convention authorizes protection stronger than any minimum terms set forth in the treaty or related special agreements, this globalization of the DMCA is, in theory, compatible with the Berne framework. However, neither adoption of the DMCA model nor ratification of the WIPO Internet Treaties has established a global harmonized baseline for technological protection measures (TPMs) or anticircumvention legislation.[130] The WCT thus accomplished a remarkable feat: a global treaty was negotiated not to harmonize various national approaches to a particular copyright issue, but rather to create a framework in which states could choose to live in disharmony—to provide specific rights within their domestic copyright laws without any concomitant obligations to attend to the often touted benefits of harmonization. The WCT goes even further. Beyond encouraging states to exercise national policy prerogatives in implementing its obligations, the WCT also contemplates that such implementation can be accomplished using noncopyright regimes such as unfair competition laws,[131] which are nonexistent in most DCs and LDCs.

B. *National Implementation of the WCT/WPPT*

In 2003, WIPO conducted a survey of thirty-nine member states that had acceded to or ratified either or both the WCT and the WPPT prior to April 1, 2003.[132] Of the countries surveyed, only Japan and the United States are considered "developed" countries.[133] Today, the WCT has seventy

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http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file934_3935.pdf.

129. *See, e.g.*, CAFTA-DR, *supra* note 128, arts. 15.5.7–.8.

130. Gasser, *supra* note 122, at 65–93 (discussing various design options).

131. *See, e.g.*, Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11, 20 & n.40 (2005) ("It is worth noting that the WCT does not require that protections for technological measures be enacted as part of national copyright laws; that certainly is one route, but so too are sui generis laws or inclusion of protections within the scope of more general laws, such as those addressing unfair competition. . . . For example, Japan has divided coverage of technological measures between the copyright law and the unfair competition law. Australia has done this solely within the provisions of its 1968 Copyright Act but makes them the subject of separate rights of action that may be brought by the copyright owner." (citations omitted)); *see also* WIPO Standing Comm. on Copyright & Related Rights, *Survey on Implementation Provisions of the WCT and the WPPT*, WIPO Doc. SCCR/9/6 (Apr. 25, 2003) [hereinafter WIPO, *Implementation Survey*], *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_6.pdf (providing an overview of the methods individual member states have utilized to implement the WIPO Internet Treaties and highlighting the diversity among them).

132. The countries surveyed were Albania, Argentina, Belarus, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, El Salvador, Gabon, Georgia, Guatemala, Honduras, Hungary, Indonesia, Jamaica, Japan, Kyrgyzstan, Latvia, Lithuania, Mali, Mexico, Mongolia, Republic of Moldova, Nicaragua, Panama, Paraguay, Peru, Philippines, Romania, Saint Lucia, Senegal, Slovakia, Slovenia, Ukraine, and the United States. *See* WIPO, *Implementation Survey*, *supra* note 131.

133. *See id.*

contracting parties, more than half of which joined the WCT in 2002 and the majority of which are DCs and LDCs.[134] Indeed, if judged solely by the acceding countries, the WIPO Internet Treaties reflect a drastic change from the concert of countries that negotiated the Berne Convention over a century ago. Where the Berne Convention countries were all European with fairly similar levels of socioeconomic development, the WCT contracting parties were mainly DCs and LDCs whose combined gross domestic product (GDP) represents a mere fraction of that of their developed country counterparts.[135]

The survey results reflect significant consistency between developed countries and DCs/LDCs in the implementation of the WIPO Internet Treaties' provisions in national laws, including limitations and exceptions.[136] This may quickly be attributed to WIPO's role in providing technical assistance in implementing the treaties to the latter group of countries. However, national implementation of anticircumvention measures and the obligation to protect rights management information were highly inconsistent.[137] Countries that provided protection against anticircumvention did so under a variety of legal means, ranging from criminal law to unfair competition law.[138] In some laws, only acts of circumvention were prohibited, while preparatory acts or making equipment available were prohibited in others.[139] Similar variations were evident in the implementation of Article 12 relating to digital rights management (DRM).[140]

As mentioned earlier, the variety of implementation models with respect to Articles 11 and 12 reflects the important flexibility in the global obligations contained in the WCT[141] and an unusual deference to the

134. *See* WCT Contracting Parties, *supra* note 4.

135. As revealed by analysis of World Bank data, in 2007, the combined real GDP of developing countries (DCs) and least-developed countries (LDCs) party to the WCT was roughly twenty percent of the combined real GDP of developed WCT members. *See* WORLD BANK, WORLD DEVELOPMENT INDICATORS 14–16 (2007).

136. *See* WIPO, *Implementation Survey*, *supra* note 131, at 2–3.

137. *See id.* at 3; *see also* Richard Li-Dar Wang, *DMCA Anti-circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions*, 34 AIPLA Q.J. 217, 219 (2006).

138. *Compare, e.g.*, WIPO, *Implementation Survey*, *supra* note 131, at 395–96 (reproducing relevant provisions of the Jamaican Copyright Act employing criminal sanctions to address anticircumvention), *with id.* at 438–39 (reproducing relevant provisions of the Japanese Unfair Competition Prevention Law employing unfair competition principles to address same).

139. *Compare, e.g.*, *id.* at 902–03 (reproducing relevant provisions of U.S. copyright law prohibiting only actual circumvention), *with id.* at 610 (reproducing relevant provisions of the Paraguayan Copyright Act prohibiting the act of making equipment available).

140. *Compare, e.g.*, *id.* at 821 (reproducing relevant provisions of the Copyright and Related Rights Act of Slovenia requiring that Rights Management Information (RMI) be embodied in a copy of the work), *with id.* at 199 (reproducing relevant provisions of the Copyright Act of the Czech Republic not requiring that RMI be embodied in a copy of a work).

141. Samuelson, *supra* note 10, at 414–15; Thomas C. Vinje, *A Brave New World of Technical Protection Systems: Will There Still Be Room for Copyright?*, 18 EUR. INTELL.

national design of digital copyright. Despite a standard that could be tilted solely in favor of owners, national laws in developed countries can and have implemented these obligations in ways that reflect deliberate policy choices and nuances that calibrate a variety of domestic interests at stake.[142] The core principle of anticircumvention, for example, designed to secure the economic interests (primarily) of owners, should yield not only to the reality of coordinated technologies that conform to modern lifestyles, but also to changed expectations of users about what such technology presumptively entitles them to do.[143]

Without question, U.S. implementation of the anticircumvention and DRM obligations[144] has engendered significant controversy both domestically and globally,[145] and important attention has been directed at the negative effects of the DMCA in the domestic U.S. market. The impact of TPMs on access to digital content has also been noted by WIPO as being of great concern to DCs and LDCs.[146] As I explore briefly in the following section, the extent of these concerns is important because, in the current global economic context, these countries have little to gain from the WIPO Internet Treaties and, by many accounts, have much to lose by the design choices made during domestic implementation of the treaties in developed countries. Importantly (or perhaps ironically), DCs and LDCs, who typically agitate for less substantive harmonization and greater domestic flexibility in IP matters, have now received it in an area in which the exercise of such flexibility has little meaning for development policy goals.

PROP. REV. 431, 431–32 (1996) (noting differences between the WCT and U.S implementation of its provisions).

142. Gasser, *supra* note 122, at 66–93; Wang, *supra* note 137, at 230–35 (comparing scope of protection of anticircumvention provisions in Japan, Australia, the European Union, and the United States).

143. *See* WIPO, *Technological Protection Measures: The Intersection of Technology, Law and Commercial Licenses*, at 4, WIPO Doc. WCT-WPPT/IMP/3 (Dec. 3, 1999) (*prepared by* Dean S. Marks & Bruce H. Turnbull), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_3.pdf.

144. *See* 17 U.S.C. § 1201(a)(1)(A) (2006).

145. *See, e.g.*, June M. Besek, *Anti-circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 467-69 (2004); David Nimmer, *Back from the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855, 867 (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 534–37 (1999). *See also generally* Ian Brown, *The Evolution of Anti-circumvention Law*, 20 INT'L REV. L. COMPUTERS & TECH. 239 (2006).

146. *See* WIPO General Assembly, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, at 3, WIPO Doc. WO/GA/31/11 (Aug. 27, 2004) [hereinafter WIPO, *Development Agenda Proposal*], *available at* http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf ("The ongoing controversy surrounding the use of technological protection measures in the digital environment is also of great concern. The provisions of any treaties in this field must be balanced and clearly take on board the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States. In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity.").

C. *Participation by Developing and Least-Developed Countries in the WCT and WPPT Framework*

With China's accession to the WCT on March 9, 2007,[147] the vast majority of the world's population has become subject to the digital copyright regime. Despite its application to a global audience whose citizens live well below the global poverty level, the stark reality is that digital copyright has yet to fully impact most citizens of DCs and LDCs. The premature ratification of the WIPO Internet Treaties is thus troubling where these regions are concerned. Over 18% of the countries that ratified the WCT are in Africa.[148] Africa is estimated to hold 14.2% of the world's population,[149] but only 5.6% of the population has access to the Internet.[150] Asia represents 60.5% of the world's population,[151] but only 17.2% of the population has Internet access.[152] In Latin America and the Caribbean, which comprise 8.6% of the world's population,[153] only 28.6% of the population has Internet access.[154] For all practical purposes, then, the vast majority of the population in these countries cannot make any significant use of digital works, and, arguably, the WIPO Internet Treaties are even less relevant to these countries than traditional copyright agreements.

If, as I argued earlier, the treaties do not enhance incentives for creativity in general, and if infrastructure needs render them mostly immaterial for most of the world's population, in what ways have copyright goals been meaningfully advanced either for users or owners *anywhere* by the proliferation of digital copyright obligations? More importantly, why was it important for DCs and LDCs to ratify the treaties?[155] Since the entry into force of both treaties, not a single DC or LDC has had reason to experiment with their provisions domestically, nor have the domestic laws implementing the treaties ever been invoked before a domestic court. This observation of limited national experience is certainly not limited to the WIPO Internet Treaties, but it does point to the extreme improbability that DCs and LDCs can exercise effective design choices at the national level. Even if so, there is a question whether such investments can be justified in the absence of sophisticated institutions to develop and sustain a public-interest balance in the deployment of TPMs locally. Nevertheless, three

147. *See* WIPO, WCT Notification No. 66, WIPO Copyright Treaty: Accession by the People's Republic of China (Mar. 9, 2007), http://www.wipo.int/edocs/notdocs/en/wct/treaty_wct_66.html. The WCT entered into force in China on June 9, 2007. *Id.*

148. *See* WCT Contracting Parties, *supra* note 4.

149. *See* POPULATION REFERENCE BUREAU, 2007 WORLD POPULATION DATA SHEET 7 (2007), *available at* http://www.prb.org/pdf07/07WPDS_Eng.pdf.

150. *See* Internet World Stats, World Internet Usage Statistics News and World Population Stats, http://www.internetworldstats.com/stats.htm (last visited Mar. 22, 2009).

151. *See* POPULATION REFERENCE BUREAU, *supra* note 149, at 8.

152. *See* Internet World Stats, *supra* note 150.

153. *See* POPULATION REFERENCE BUREAU, *supra* note 149, at 8.

154. *See* Internet World Stats, *supra* note 150.

155. *See Tracking Pirates in Cyberspace*, 24 LOY. L.A. ENT. L. REV. 73, 76 (2004) (remarks of Peter Harter, Managing Principal, The Farrington Group).

main reasons can be identified for extending the WIPO Internet Treaties to the Southern Hemisphere.

1. As It Was in the Beginning: The Importance of Making Good on Claimed Benefits

Assimilating DCs and LDCs into the global copyright system is a familiar component of the path dependency characteristic of global copyright lawmaking. Since the Stockholm Protocol, which first formally acknowledged special needs of DCs,[156] no other revision of the Berne Convention or associated special treaty has purposively sought to identify the impact of new provisions on the development needs and aspirations of the global South beyond general statements regarding the "balance" evidenced by the formal language of the treaties.[157] Instead, the justifications for "globalizing copyright" have sought to impute benefits deeply linked to and dependent on the existence of capital markets and institutional actors to copyright regulation in the impoverished and unstable economies of much of the Southern Hemisphere. In the context of the WIPO Internet Treaties, DC and LDC participation has been specifically justified in ways that echo disputed, untested, and at times inapplicable (but as yet historically pervasive) rationalizations for the internationalization of IP more generally. These include, most notably, benefits of technology transfer, foreign direct investment, stimulation of domestic creativity and innovation, and general development progress. However, none of these claims have been proven in the experience of most DCs and LDCs, and there is some consensus that the relationship between IP and development is much more complex than the claims suggest. Indeed, it is instructive to compare official justifications for DC and LDC participation in the WIPO Internet Treaties with concerns articulated by these countries in the proposal for a WIPO Development Agenda. With respect to the possibility of foreign technology transfers, the proposal states,

> The transfer of technology has been identified as an objective that intellectual property protection should be supportive of and not run counter to, as stated in Articles 7 and 8 of the TRIPS Agreement. Yet,

156. *See* RICKETSON, *supra* note 45, at 593–623.

157. References to "balance" and "flexibilities" have recently become a staple part of IP *lingua franca*, including within WIPO, which has historically emphasized the benefits of IP protection for development. *See, e.g.*, WIPO Standing Comm. on Copyright & Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Doc. SCCR/9/7 (Apr. 5, 2003) (*prepared by* Sam Ricketson), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf. But formal statements alone cannot alleviate the burden of IP enforcement in DCs and LDCs, nor alter the troubling practice of offering technical assistance to these countries primarily for enforcing rights, not limitations and exceptions—which are the mechanisms of the so-called balance reflected in the treaties. *See, e.g.*, WIPO Permanent Comm. on Cooperation for Dev. Related to Intellectual Prop., *WIPO's Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement from January 1, 1996, to June 30, 2000*, WIPO Doc. WIPO/TRIPS/2000/1 (Aug. 1, 2000), *available at* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=33295.

> many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology.
>
> Even in developing countries that may have a degree of absorptive technological capacity, higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment and licensing. In effect, corrective measures are needed to address the inability of existing IP agreements and treaties to promote a real transfer of technology to developing countries and LDCs.[158]

Yet, according to a WIPO document outlining the advantages of adherence to the WCT and WPPT,[159] digital copyright protection

> will encourage investment in the country, both domestic and foreign, by providing greater certainty to businesses that their property can be safely disseminated there.
>
> . . . .
>
> The level of intellectual property protection and enforcement is very much a factor in industry's decisions to invest in any particular country. Companies evaluate the likelihood that they will sell enough legitimate copies of the products—in light of local intellectual property protection. It does not make sense for investors to put money into a market where they will not recover their investment and generate a reasonable profit. For copyrighted products, this depends almost entirely on the level of copyright protection. Adherence to the treaties makes a strong statement of the country's commitment to copyright protection and readiness to respond to technological change.[160]

Another stated advantage of the WIPO Internet Treaties includes the protection in developed countries of works by local creators and enterprises from DCs and LDCs, which ensures "that [these] creators and enterprises enjoy the economic rewards from outside the country."[161] Yet, recently, a major Indian filmmaker noted the failure of U.S. authorities to crack down on U.S. sales of home videos of movies made in India.[162] Indeed, it is hardly likely that enforcement of foreign rights in developed countries represents any meaningful concern for authorities in those countries.[163] Further, claims that "jobs all over the world" are created by copyright industries, "not just for developed countries, but also for developing countries and for many related economic sectors that contribute to

158. WIPO, *Development Agenda Proposal*, *supra* note 146, Annex, at 3.

159. *See generally* WIPO, *Advantages of Adherence*, *supra* note 76.

160. *Id.* at 7.

161. *Id.* at 4.

162. *See* Tony Dutra, *Indian Film Maker Faults Failure to Address Counterfeit Movie Sales in U.S.*, 75 Pat. Trademark & Copyright J. (BNA) 680, 680–81 (2008).

163. *Id.* at 681 (noting Indian film producer's hopes that cooperation between the Indian film industry and the Motion Picture Association of America (MPAA) could help address the issue of enforcement of foreign rights in the United States).

manufacturing, sales and service of these products"[164] simply are not borne out by existing empirical evidence or the conclusions of leading economists.[165] Neither is the claim that copyright industries can make significant contributions to the economies of developing countries. In short, other than the enactment of implementing legislation, there is no evidence of local engagement with the WIPO Internet Treaties in DCs and LDCs, much less any evidence to verify these assertions.

Even with respect to benefits that might inure to developed countries, such as the enhancement of technology markets and e-commerce, the stated official justifications are simply facile. Technology markets in IP have been stymied for a variety of reasons that include a reliance on the right to exclude use as a dominant model.[166] In Europe, where considerable substantive harmonization has occurred since the 1990s, there remain considerable challenges to the development of a robust internal market for online works.[167]

2. The Accountability Deficit

Claims that strong protection for IP will ineluctably produce positive development gains in the global South systematically underestimate and undervalue the importance of access to knowledge and technology as part of a necessary global bargain to facilitate consumer creativity and contribute to development aspirations. Similarly, resting the development challenge solely at the feet of a flawed global IP system falls far short of confronting the significant infrastructural shortcomings of many DCs and LDCs, which makes harnessing IP rights (balanced or not) for development

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164. WIPO, *The Digital Agenda*, *supra* note 98, at 5; *see also* WIPO, *Advantages of Adherence*, *supra* note 76, at 6.

165. *See, e.g.*, Edwin Mansfield, *Unauthorized Use of Intellectual Property: Effects on Investment, Technology Transfer, and Innovation*, *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 107, 122–24 (Mitchel B. Wallerstein et al. eds., 1993); Keith E. Maskus & Denise Eby Konan, *Trade-Related Intellectual Property Rights: Issues and Exploratory Results*, *in* ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 401, 414–15 (Alan V. Deardorff & Robert M. Stern eds., 1994). *See generally* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000).

166. *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 2 (2007) (discussing the difficulties antitrust regulators face in technology markets due "to the uncertain fit between the market conditions that produce innovation and the market conditions to which antitrust policy generally aspires, and, in part, to uncertainty about how innovation might affect market structure and performance"); Keith E. Maskus, *Using the International Trading System to Foster Technology Transfer for Economic Development*, 2005 MICH. ST. L. REV. 219, 234–35 (noting that a principal factor inhibiting international technology-transfer markets is market power of owners of technical information rooted in, among other things, the exercise of IP rights); Kathryn McMahon, *Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets*, 9 TUL. J. TECH. & INTELL. PROP. 123, 171 (2007) (discussing the detrimental effects of "abusive and exclusionary conduct" in high technology markets); *see also* Ballard, *supra* note 116, at 448.

167. *See generally* Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2007).

a truly difficult task. Nevertheless, the fact that DCs and LDCs are somehow successfully persuaded to ratify major IP treaties suggests that there is some capacity at the global institutional level to influence the direction of IP regulation in the global South. Arguments presented systematically by private actors, developed countries, and even WIPO[168] that new rights and regimes offer development benefits to DCs and LDCs require regulatory space to address, on a global front, the access needs that are most relevant to leveraging technology for development gains in areas ranging from bulk access to educational materials to distance learning.[169] There should be corresponding accountability by WIPO and developed countries for the negative effects of heightened copyright standards and, importantly, attention directed at redressing the lack of corresponding minimum limitations and exceptions in the global copyright scheme that now includes the WIPO Internet Treaties. This lack of accountability for the claims that, when leveraged, have historically encouraged DC and LDC ratification of IP treaties, have contributed to a political and institutional global culture in which the needs of DCs and LDCs are often framed as illegitimate attempts to undermine the economic value of IP rights. If such value is not dispersed among all signatory countries, there can be nothing illegitimate about demands that the system be examined to determine its impact on the aspirations of the majority of treaty members.

3. Considerations of Private Enforcement

To the extent consumers in the global South are far less vulnerable to the enforcement processes of developed countries, the legitimacy and efficacy of technological controls become far more important to content providers whose reliance on private enforcement will likely be far greater across territorial lines. Ratification of the WIPO Internet Treaties by DCs and LDCs was thus important not necessarily to obligate these countries to new copyright standards as such, but, instead, as a means for content providers to circumvent reliance on domestic institutions in those countries in enforcing their rights—whether or not such rights are consistent with the domestic choices of treaty implementation. Put differently, the technological protection controls legitimized in the WIPO Internet Treaties not only trivialize the possibility that users in the global South might actually engender value in the global networks, but could also render the dominance of national copyright laws a nullity.

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168. *See* Tove Iren S. Gerhardsen & William New, *WIPO Copyright Advice Deemed Misleading to Developing Countries*, INTELL. PROP. WATCH, Feb. 20, 2006, http://www.ip-watch.org/weblog/index.php?p=221.

169. *Id.*; *see also* Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 840–42 (2007).

D. *The Importance of Accounting for the Future*

As with the developed countries, the WIPO Internet Treaties simultaneously offer too little for users in DCs and LDCs. The sheer populational advantage of the global South is increasingly being leveraged by the new models of interaction, entrepreneurship, and creativity that pervade the digital realm.[170] Over 80% of estimated Internet users live outside of the United States and 50% of the online advertising market is also non-U.S.[171] Between 2006 and 2007, use of social networking sites in the Middle East and Africa increased by almost 70%, and in Asia Pacific by 50%.[172] In international fora, demands by DCs and LDCs that global copyright regulation must reflect and be accountable to broader economic and social goals have engendered new action programs and initiatives,[173] while an active and engaged civil society network steadfastly resists the unfettered expansion of IP rights more generally.

The tendency of global copyright regulation to marginalize the public-interest priorities that make copyright law both necessary and relevant is evident in the compromises that yielded the WIPO Internet Treaties. After more than a decade, neither developed countries nor DCs/LDCs appear to have benefited uniquely from the hard-fought battle over the appropriate role of copyright in the digital age; instead, there appears to be only increasing regulatory space for private lawmaking to occur[174] as the best means to appropriate copyright's goals within the contested arena of global digital networks. This might suggest that the real danger of the WIPO Internet Treaties is not that they strengthen private copyright interests, but that they make public copyright regulation less meaningful. At best, it would appear that the WIPO Internet Treaties offered too little too early and, consequently, serve a more technocratic and political—rather than substantive and legal—role in the future of digital copyright.

CONCLUSION

The importance of copyright's attention to users has been evident since the first copyright law of modern history. The British Statute of Anne[175] established metes and bounds for consumer experiences of creative expression, indeed offering mechanisms and processes to curb overly

170. *See* Jon Swartz, *Social-Networking Sites Going Global*, USA TODAY, Feb. 11, 2008, at 3B.

171. *Id.*

172. *Id.*

173. *See, e.g.*, WIPO, *Development Agenda Proposal*, *supra* note 146, Annex, at 1.

174. On some important issues regarding private norms in international copyright law, see generally Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 161, 173–74 (2004).

175. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's or Purchasers of Such Copies, 1709, 8 Ann., c. 19 (Eng.), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 36, 36–38 (Philip B. Kurland & Ralph Lerner eds., 1987).

aggressive exercises of the new property rights.[176] Similarly, in the United States, state copyright laws also recognized limits to the statutory grant,[177] as did the federal scheme that has evolved since the late nineteenth century. At no time was copyright law ever conceived or designed as the exclusive repository of authorial interests.[178] Instead, copyright law mediated internal tensions between the creative experiences of authors writing over the shoulders of giants,[179] and of readers or other kinds of users whose interaction with the subjects of copyright generated a diffuse but important social value. Art, music, and literature were not only casual entertainment, but modes of cultural dialogue, critical commentary, reflections on social and political conditions, and opportunities to express life in invariable dimensions. The creative and the consumptive processes were inextricable and unalterably linked, even if not explicitly structured through the early canons of copyright regulation. The new rights introduced by the WIPO Internet Treaties threatened to redirect the social value of the copyright system away from diffusion to containment. But, ultimately, they cannot alter or overcome the creative engagement of users whose interests are critical to the capacity of owners and technology suppliers to appropriate value from technological innovation.

176. *See id.* § 4 (establishing process for seeking relief from unreasonably high prices for copyrighted works).

177. *See* Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 306–07 (2002) ("Between 1783 and 1786, twelve states enacted general copyright statutes. All these states limited the initial and renewal terms either to those specified in the Statute of Anne or to a 'fixed term of twenty or twenty-one years.'" (citing Edward C. Walterscheid, *Defining the Patent & Copyright Term: Term Limits & the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 350 (2000))). For example, Pennsylvania's statute granted "'the exclusive right of printing, publishing and vending the same, within this state, for the term of fourteen years.'" Francine Crawford, *Pre-constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y U.S.A. 11, 21–22 (1975) (quoting 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 272 (1906)). Some colonial laws also specifically excluded foreign works from the scope of protection. *Id.* at 21.

178. *See* H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961) ("The ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end."); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (noting that the goal of copyright law is "to stimulate activity and progress in the arts for the intellectual enrichment of the public").

179. *See* Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1676). For the history of this quotation, which was apparently in general use during Isaac Newton's time, see ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (1965).